NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MICHAEL SHERIDAN MCKINNEY,	) No. 89-55869
Petitioner-Appellee,	) D.C. No. CV 87-5448-RJK (S)
v.	) ORDER
ROBERT M. REES, Superintendent; JOHN K. VAN DE KAMP,	)
Respondents-Appellants.	)

Before: BROWNING, PREGERSON, Circuit Judges, and ORRICK*/ District Judge

The panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear

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*. The Honorable William H. Orrick, Senior United States District Judge, District of Northern California, sitting by designation.

the matter en banc. Fed. R. App. p. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX F

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

MICHAEL SHERIDAN McKINNEY,	)	Civil No.
	)	CV 87-5448-
Petitioner,	)	RJK(S)
	)	
v.	)	REPORT AND
	)	RECOMMENDATION OF
REES,	)	UNITED STATES
SUPERINTENDENT, et al.,	)	MAGISTRATE
	)	ON A PETITION FOR
Respondents.	)	WRIT OF HABEAS
	)	CORPUS BY
	)	A PERSON IN
	)	STATE CUSTODY
	)	

This Report and Recommendation is submitted to the Honorable Robert J. Kelleher, United States District Judge, pursuant to the provisions of 28 U.S.C. section 636(b)(1)(B) and General Order 194 of the United States District Court for the Central District of California.

BACKGROUND

Petitioner is incarcerated at the Deuel Vocational Institution, Tracy, California. He was

convicted in the California Superior Court of first degree murder, and was sentenced to a state prison term of twenty-six years to life. Petitioner's conviction was affirmed on appeal to the California Court of Appeal, and his petition for writ of habeas corpus to the California Supreme Court was denied.

On August 18, 1987, Petitioner filed a Petition For Writ of Habeas Corpus in this Court. Petitioner claims that he was denied his Federal constitutional right to Due Process of law as a result of the admission at trial of evidence of his prior ownership and use of knives. He argues that the admission of this evidence made his trial fundamentally unfair.

APPLICABLE LEGAL PRINCIPLES

1. In order to be entitled to Federal habeas corpus relief, a state prisoner must show that he is in custody in violation of the Constitution or laws of the United States. 28

U.S.C. 2254(a).

2. The erroneous admission of evidence in a state criminal proceeding does not necessarily impinge on a defendant's Federal Constitutional rights. However, an erroneous evidentiary ruling which is so significant that it deprives a defendant of his right to a fundamentally fair trial constitutes a denial of Due Process under the Constitution of the United States. McGuire v. Estelle, No. 87-2522, slip op. at 4829 (9th Cir. May 8, 1989); Kealohapauole v. Shimoda, 800 F.2d 1463 (9th Cir. 1986); Palmer v. DeRobertis, 738 F.2d 168 (7th Cir. 1984); Batchelor v. Cupp, 693 F.2d 859 (9th Cir. 1982).

3. Pursuant to California law, evidence of a criminal defendant's prior conduct is inadmissible if its sole relevance is to show his disposition or propensity to commit the offense charged. California Evidence Code section 1101; People v. St. Andrew (1980) 101 Cal.App.3d 450, 161 Cal.Rptr., 634. The primary purpose of this rule

(known historically as the 'character rule') is to ensure that a jury will not convict a defendant of a current charge just because he has been a 'bad' person in the past. E.G., People v. St. Andrew, supra; see also United States v. Brown, No. 86-5306, slip op. at 4383, 4386-4387 (9th Cir. April 27, 1989); People v. Alcala (1984) 36 Cal.3d 604, 205 Cal.Rptr. 775.

4. 'Evidence that a defendant had in his possession a weapon that could not have been used in the crime charged leads logically only to an inference that such defendant is the kind of person who surrounds himself with deadly weapons - an inference of no relevant consequence to a determination of guilt or innocence.' People v. De La Plane (1979) 88 Cal.App.3d 223, 240, 151 Cal.Rptr. 843, 852; People v. Henderson (1976) 58 Cal.App.3d 349, 360, 129 Cal.Rptr. 844, 850-851.

5. Pursuant to California law, the trial court has the discretionary power to exclude evidence which is otherwise admissible, if the

probative value of the evidence is substantially outweighed by the probability that its admission will 'create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.' California Evidence Code section 352(b).

6. In a Due Process analysis of the admission of questionable evidence, the issue to be determined is whether or not the probative value of the evidence outweighed the prejudice to the accused. McGuire v. Estelle, No. 87-2522, slip op. at 4829, 4836 (9th Cir. May 8, 1989), citing with approval Palmer v. DeRobertis, 738 F.2d 168, 171 (7th Cir. 1984).

EVIDENCE PRESENTED

The Reporter's Transcript (R.T.) of the trial shows the following:

a. Late on the night of January 28, 1984, Betty McKinney was murdered at home in her bed. Her throat had been cut by a knife or other sharp-edged instrument. The murder weapon was never recovered. There were no signs of forced

entry to the victim's home. Present at the home at the time of the murder were two other persons: Quentin McKinney, the victim's husband; and Michael McKinney (Petitioner), her eighteen-year old adopted son who was a college student at that time. Both men testified at the trial. The testimony of each one exculpated himself but left open the possibility of the guilt of the other. There were no witnesses to the commission of the murder, and no confessions of guilt. The prosecution's case was based on circumstantial evidence, most of which raised equivocal inferences.

b. Prior to commencement of the trial, the court and counsel dealt with disputed evidentiary issues, out of the presence of the jury. One of the issues pertained to evidence that Petitioner had owned and used knives at times prior to the commission of the murder. The prosecutor stated his intention to introduce a knife which Petitioner had owned and which had been seized from him and permanently retained by the police in

September of 1983 (4 months before the murder). The prosecutor intended to show Petitioner's "fascination" with certain types of knives. (R.T. 28, 32, 35) Other knives which Petitioner had owned were also going to be presented. (R.T. 29) Defense counsel objected to the introduction of any such evidence as being violative of the "character rule." (R.T. 30-31, 36) The court ruled that the evidence was admissible. (R.T. 36-37)

c. During the testimony of Quentin McKinney, Petitioner's father (by adoption), the prosecutor was permitted to show the witness the "Gerber" dagger (Exhibit 9) and "Tekna" dagger (Exhibit 10) which were previously owned by Petitioner, and asked whether he had ever seen them before or known Petitioner to have owned one of them. (R.T. 116-117) The prosecutor was also permitted to ask whether Petitioner had ever told him that the police had taken a knife from Petitioner in September of 1983. (R.T. 121-122)

d. Los Angeles Police Department

(LAPD) Officer Smith was permitted to testify that on September 25, 1983, [four months prior to the murder] he took a double-edged Gerber knife (Exhibit 9) from Petitioner. (R.T. 373-374)

e. Constantine Potamianos, a friend of Petitioner, was permitted to testify as follows: that prior to the date of the murder, he had known Petitioner to possess dagger type knives which were sharpened on both edges (R.T. 411); that Petitioner had the Gerber and Tekna knives (Exhibits 9 & 10) with him during the summer of 1983 [six months prior to the murder] on a trip to Mexico (R.T. 411-412); that Petitioner gave the Tekna knife (Exhibit 10) to Potamianos prior to Thanksgiving of 1983; that Potamianos gave it to the prosecution shortly before trial (R.T. 414-416; that he knew Petitioner's Gerber knife had been taken from him by the police in September of 1983 (R.T. 415-416).

f. Christopher Roderick, who shared a college dormitory room with Petitioner, was permitted to testify as follows: that between late

August and the beginning of December, 1983, Petitioner had a single-edged knife and a double-edged knife (R.T. 436-437); (the witness made a drawing of the double-edged knife, which was received in evidence) (R.T. 438 & 927); that he became aware in September or October of 1983 that the police had taken a knife from Petitioner (R.T. 439); that he overheard Petitioner on the telephone talking about the knife which the police had taken, apparently upset because it was his favorite knife (R.T.439-440); that Exhibit 11 [a new Tekna knife purchased by the prosecution for use at the trial] closely resembled a knife Petitioner had at school (R.T. 440); that he saw Petitioner wear the knife once or twice strapped to his leg (R.T. 441); that he saw the knife out of its carrier once or twice (R.T. 441); that one evening between Thanksgiving and December 9, 1983, he observed Petitioner use the Tekna knife to scratch some words on a closet door at the dorm (R.T. 445-447); that the words Petitioner scratched on the door were "Death is

his" (R.T. 448); that Petitioner then stuck the knife in the wall and left it there (R.T. 447). The witness then identified two color photographs of the "Death is his" writing on the wall as being accurate depictions; the prosecutor was permitted to place the color photographs in evidence (R.T. 449 & 927). Roderick was again called upon to testify that Petitioner strapped on a Tekna knife at school (R.T. 450); that the knife closely resembled the knife which the prosecutor had purchased for use at the trial (R.T. 455-457); and that Petitioner stuck the knife in the wall after scratching "Death is his" on the door (R.T. 457). And again the color photographs were reviewed with the witness (R.T. 457). Roderick was permitted to testify that he saw Petitioner sharpening the knife two or three times at the dormitory (R.T. 457); that on at lease four occasions he saw Petitioner strap the knife on at school (R.T. 458); that during a power outage at school, Petitioner strapped his knife on, went out somewhere and

stayed out 'half the night' (R.T. 458-459).

g. Dr. William E. Sherry, a county deputy medical examiner, testified in pertinent part as follows: that the victim suffered four wounds which were caused by either cutting or stabbing (R.T. 470); that the wounds could have been inflicted by various types of knives, including: a knife sharpened on both sides (R.T. 483); a knife sharpened on one side with a thin dull side, such as a kitchen or restaurant steak knife (R.T. 483-484); a double edged dagger (R.T. 484); a weapon with a sharp edge (R.T. 493); a pointed weapon with at least one sharp edge (R.T. 493). Dr. Sherry testified that two of the four wounds could have been caused by a class of knives such as Exhibit 11 [the new Tekna knife purchased by the prosecution] (R.T. 496); that the neck wound which caused death could have been made by any instrument with a sharp edge (R.T. 473-474, 496), including a razor blade (R.T. 499). On cross examination, Dr. Sherry testified that the victim's

wounds could have been inflicted by a Tekna, or a Gerber, or a folding Buck knife[1], or a kitchen knife or knives which could be found in a typical home kitchen (R.T. 496-500).

h. Jane Kelsey, a college friend of Petitioner, testified that although she never saw him wearing any knife, Petitioner talked to her about his collection of "valuable knives" on several occasions (R.T. 522).

i. When Petitioner testified, on cross examination the prosecutor was permitted to question him about: a Smith and Wesson knife he previously owned and sold in June or July of 1983 [six or seven months prior to the murder] (R.T. 744-745); why he had purchased the Smith and Wesson (R.T. 745); whether he had a "fascination" with knives (R.T. 746); whether Petitioner "liked" knives (R.T. 746); whether Petitioner "liked"

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1. Petitioner's father, Quentin McKinney, owned a Buck knife.

owning knives (R.T. 746); whether Petitioner "liked" to stop and look at knives in store windows (R.T. 746); whether Petitioner "liked" to "examine" knives (R.T. 746); whether Petitioner often talked to Jane Kelsey about knives (R.T. 747); whether knives were Petitioner's "hobby" (R.T. 747); whether Petitioner "enjoyed" "collecting" and "talking about the different types of knives" he had (R.T. 747). Petitioner was cross examined endlessly about why he had owned knives of certain types and colors at time periods months before the murder took place (R.T. 747 et seq.).

j. In his argument to the jury, the prosecutor expressed the view that Petitioner's history of knife ownership was one of three main areas of evidence which were relevant to prove Petitioner's guilt (R.T. 1007-1008, 1027). At another point, the prosecutor stated to the jury that the knives were one of two subjects they should be "most interested in" in deciding the case (R.T. 1021). He argued that the victim was

probably killed with a double edged knife[2/], and related that 'fact' to knives which Petitioner had owned and which could have been the murder weapon (R.T. 1008-1010, 1076). He then recounted the incident in which a Gerber dagger was taken from Petitioner by police on September 25, 1983, and described its seven-inch double edged blade (R.T. 1011). He failed to point out that the Gerber knife was retained by the police, and could not have been the murder weapon.

Consistent with his theory of the case, the prosecutor recounted the testimony of Petitioner's college roommate that Petitioner had two knives at school, and carved 'Death is his' on a closet door (R.T. 1015). The prosecutor referred frequently to Petitioner's knives throughout his argument (R.T. 1015-1016, 1018, 1021, 1022-1023, 1027, 1045, 1046, 1069, 1080), and went so far as

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2. The evidence did not actually support this assertion. See the summary of the testimony of Dr. Sherry.

to declare that Petitioner "had an obsession with knives - in particular, double edged daggers." (R.T. 1080) The prosecutor made much of the fact that Petitioner had "talked about knives quite often" to a college friend, and seemed to be very proud of his knives (R.T. 1022). In his argument, the prosecutor translated the evidence of Petitioner's prior ownership of knives into the present ownership of "knives" at the time the murder took place (R.T. 1064).

DISCUSSION

The evidence of Petitioner's prior ownership and use of knives was presented by the prosecution on the stated premise that such evidence was directly admissible on the issue of Petitioner's guilt of the murder which was committed on January 28, 1984, and was of crucial importance. Pursuant to this theory, the prosecution was permitted to show: that Petitioner had owned a Smith and Wesson knife, which he sold during the summer of 1983; that he had owned a

Gerber knife, which was permanently taken from him by the police in September of 1983; that he had owned a Tekna knife which was given to a friend prior to Thanksgiving of 1983, although one witness testified that he saw Petitioner with it possible as late as December 9, 1983[3]; that Petitioner "liked" knives, talked about them, wore one strapped to his leg, and used one to carve "Death is his" on a closet door. The prosecutor argued that Petitioner had a "fascination" for knives, and heavily relied on the testimony concerning Petitioner's prior activity with knives in urging a conviction. In summary, the prosecution painted a picture of an obsessive, knife-wielding defendant, and based a large part of its case on the concept that this materially contributed to the proof of Petitioner's guilt.

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3. The witness who testified in court that Petitioner may have had the Tekna knife as recently as December 9, 1983, had initially told the police that he last saw Petitioner with the knife in October of 1983.

It is the opinion of the Magistrate that none of the evidence of Petitioner's prior possession and use of knives should have been admitted in evidence at the trial. The only logical inference raised by such evidence is that Petitioner was the kind of person who surrounded himself with deadly weapons, and he therefore had a disposition or propensity to commit the offense charged. This is precisely the kind of evidence which the 'character rule' as codified in California Evidence Code section 1101 was intended to exclude.

Moreover, even if a technically valid basis for the admission of some small part of this evidence can be put forward, such arguments must fail in light of California Evidence Code section 352. For example, the effect on the jury of testimony of Petitioner having carved 'Death is

his"[4] on the closet door of his college dorm was undoubtedly devastating. The admission of such evidence cannot be justified as helping to pin down a discrepancy in dates, and should have been excluded under section 352.

Due Process analysis requires weighing the value of the improperly admitted evidence against the prejudice suffered by Petitioner as result of its admission. As was noted above, the evidence had little or no value because it raised improper inferences which violated the character rule. The prejudice to Petitioner was substantial; he was tried and convicted as much on evidence of his past history with knives as he was on evidence directly related to the murder. The evidence against Petitioner was entirely circumstantial, and was far from overwhelming. Petitioner's credibility was critical to his defense. After a

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4. No evidence was presented to explain the meaning of these words or to connect them in any way to the crime charged.

review of the entire record of proceedings in the trial court, the Magistrate finds that Petitioner would probably not have been convicted if it were not for the improperly admitted evidence. Therefore, the Magistrate finds that Petitioner was deprived of his right to a fundamentally fair trial under the Due Process Clause of the Constitution of the United States.

RECOMMENDATION

It is concluded that Petitioner is entitled to a writ of habeas corpus. The Magistrate recommends that an Order be issued by the Court: (1) approving and adopting this Report and Recommendation; and (2) directing that Judgment be entered issuing a conditional writ requiring the release of Petitioner from custody unless charges are refiled against him within ninety days of the

date of entry of judgment herein.

Dated: June 19, 1989

ROBERT M. STONE
United States Magistrate

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

MICHAEL SHERIDAN McKINNEY	)	Civil No.
	)	CV 87-5448-
Petitioner,	)	RJK(S)
	)	
v.	)	ORDER
	)	ADOPTING
ROBERT M. REES,	)	FINDINGS,
SUPERINTENDENT, et al.,	)	CONCLUSIONS
	)	AND RECOMMENDATIONS
Respondents.	)	OF UNITED STATES
	)	MAGISTRATE

Pursuant to 28 U.S.C. section 636(b)(1)(B), the Court has reviewed the pleadings and other papers herein, the attached reports and recommendations of the Magistrate and the objections to the Magistrate's initial Report and Recommendation, and approves and adopts the Magistrate's findings, conclusions and recommendations. The Court has made a de novo determination of those portions of the report to which objection has been made.

IT IS ORDERED that a conditional writ be granted. Petitioner shall be released from

custody unless charges are refiled against him within ninety days of the date of entry of judgment herein.

IT IS FURTHER ORDERED that the Clerk shall serve copies of this Order, the Magistrate's reports and recommendations and the Judgment by United States mail on Petitioner and the Attorney General of California.

Dated: July 27, 1989

ROBERT J. KELLEHER
United States District Judge

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

MICHAEL SHERIDAN McKINNEY Petitioner, v. ROBERT M. REES, SUPERINTENDENT, et al., Respondents.	)	Civil No. CV 87-5448-RJK(S) JUDGMENT

Pursuant to the order of the Court adopting the findings, conclusions and recommendations of the United States Magistrate,

The Petition For Writ Of Habeas Corpus is conditionally granted. Petitioner shall be released from custody unless charges are refiled against him within ninety days of the date of entry of judgment herein.

Dated: July 27, 1989

ROBERT J. KELLEHER
United States District Judge

APPENDIX G

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT

OF CALIFORNIA

MICHAEL SHERIDAN MC KINNEY,	)	
	)	Case No.
Petitioner,	)	CV87-5448-RJK (B)
v.	)	
	)	ORDER
ROBERT M. REES, SUPERINTENDENT, et al.,	)	
Respondents.	)	

In this habeas corpus action, a Return was timely filed and the Magistrate has determined to accept the Traverse, although it was filed seven days late.

Respondent, alleging nonexhaustion of state remedies, has not briefed the merits of the contentions raised in the petition. As to exhaustion, a direct appeal to the California Supreme Court from the affirmance of the California Court of Appeal was rejected when appellate counsel filed one day out-of time. Appellate counsel then

sought review by the High Court by means of habeas corpus, admitting that he was 'ineffective' for having miscalculated the last day upon which to file the appeal, and praying that the court 'grant this petition for writ of habeas corpus and reverse the trial court judgment of conviction' on the 'issues . . . contained in the petition.' Return, page 308, emphasis added. The issues so contained include all of those sought to be raised in this action. Return, pp. 307-308. Appellate counsel asked the California Supreme Court to 'consider the merits of issues not preserved on appeal by granting the petition for writ of habeas corpus.' Return, page 213. The same issues unsuccessfully presented to the California Court of Appeal, and which are raised in this action, were then briefed to the California Supreme Court. Return, pp. 314 et seq. It was this petition which the latter court denied on September 24, 1986. Return, page 4.

The Magistrate now accordingly holds that

petitioner has sufficiently exhausted in California courts the issues he seeks to present herein. His subject claims have been fairly presented to the highest court of the state. Picard v. Connor, 404 U.S. 270, 276-78 (1971); Tamapua v. Shimoda, 795 F.2d 261, 262 (9th Cir. 1986).

IT IS THEREFORE ORDERED that the respondent herein, or the California Attorney General, shall serve and file a Supplemental Return, addressing the merits of the petition, on or before March 28, 1988.

IT IS FURTHER ORDERED that petitioner may serve and actually file his Supplemental Traverse on or before May 2, 1988. The matter shall stand submitted on the papers then on file on the earlier of the court day after the filing of the Traverse

on May 3, 1988.

DATED: February 19, 1988.

VOLNEY V. BROWN, JR.
United States Magistrate